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June 1, 2004

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, D.C. 20554

Re: *Ex Parte* Presentations in Docket MB 04-64, In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection

Dear Ms. Dortch:

On May 28, 2004, Douglas Comer (in person) and Jeffrey Lawrence (by telephone) of Intel Corporation, Paul Schomburg of Panasonic (in person), Joel Wiginton (in person) of Sony Electronics and Jennifer Coplan of the law firm of Debevoise and Plimpton (by telephone) representing Sony Corporation, and the undersigned (in person) representing Hitachi, Ltd., held an *ex parte* meeting with the following:

Media Bureau

Steven Broeckaert, Rick Chessen, John Gabrysch, Alison Greenwald, William Johnson, Mike Lange, Susan Mort, and Jeff Neumann

Office of Strategic Planning and Policy Analysis

Amy Nathan

Office of Engineering and Technology

Alan Stillwell

The meeting covered the matters set forth in the Certification submitted by the Digital Transmission Licensing Administrator LLC in the above-captioned proceeding, particularly relating to the licensing model for DTCP and certain of its terms and conditions.

In brief, DTLA observed that DTCP licenses follow a well-established licensing model, adopted for many content protection technologies, that minimizes the cost of content protection for consumers and reduces the risk of litigation or excessive royalty costs for all licensees. All

licensees obtain a low-cost technology solution, on reasonable terms, administered in a fair and nondiscriminatory manner. The Adopter Agreement and Content Participant Agreement for DTCP are posted publicly to the DTLA website, as are non-confidential versions of the DTCP Specifications. Licenses are offered on a non-discriminatory basis, upon the same terms and conditions to all similarly-situated parties.

DTLA licenses a Specification created by the 5C Companies. DTLA is not a “patent pool.” The 5C Companies created the Specification for a protection technology arising out of separate proposals that they had submitted in response to a call from proposals issued by an inter-industry Digital Transmission Discussion Group, one of the early efforts of the Copy Protection Technical Working Group. The DTCP technology implicates certain patent, trade secret and copyright rights owned by the 5C Companies. To assure licensees that the Specification can be used without incurring any IP risk from the 5C Companies, the DTLA licenses grant all IP rights owned or controlled by the 5C Companies that are necessary for the use of the Specification in implementing DTCP – but only those necessary rights. Licensees neither obtain nor are required to accept any other IP rights.

License fees are based on the costs of administration, technology development, maintenance and key generation, and are not typical commercial royalty rates. DTLA believes costs for content protection should be as low as possible, since although such content protection consumers will not willingly pay extra for it. To make such low fees possible, DTLA has adopted a license model and terms that help limit the risks and costs to DTLA and its licensees.

As an essential part of the license model, all Adopters (including the 5C Companies) and all Content Participants covenant, on a non-exclusive basis, not to sue any other licensee under any IP rights that they own or control that are necessary for the use of the DTCP Specification.

The covenant not to sue is reasonable and appropriate. Since DTLA does not charge commercial rates, it would be unfair for a licensee to leverage DTLA’s license as a means to obtain commercial royalties on DTCP. The covenant thus reduces the cost of the technology for all licensees who elect to use the DTCP Specification, by reducing the risk of any licensee charging supracompetitive royalties and the risks from lawsuits between licensees.

The covenant not to sue does not impede innovation. The covenant applies only to IP “necessary” to implement the DTCP Specification, so is no broader than the license grant from DTLA. The 5C Companies give and obtain the same covenant as any other licensee. Licensees remain free to exploit for any and all other purposes the IP that they develop, on whatever license terms they prefer. For example, any Adopter can use its IP that is subject to the covenant to create technologies that compete with DTCP, or that are proprietary add-ons to DTCP, and any Adopter retains the right to license such IP at commercial rates to all DTCP licensees – including the 5C Companies. Given the narrow scope of the Specification and the limited scope of any changes to the DTCP Specification permitted under the Adopter Agreement and Content Participant Agreement, there is no basis for any purported licensee concern that DTLA might

intentionally change its Specification so as to “sweep in” a licensee’s IP rights. Thus, the covenant is not anticompetitive. To the contrary, the covenant provides incentives to create competing technologies that can fully exploit the licensee’s IP.

Licensees know the scope of the covenant before agreeing to it. Any Adopter can evaluate the confidential elements of the Specification before signing the Activation Notice to the Adopter Agreement and, so, will understand the scope of the Specification before assuming any obligations under the covenant. Over the five years that DTLA has licensed DTCP, no licensee has identified any IP that they contended was subject to the covenant.

DTLA recognized that it could have implemented a licensing model whereby DTLA charged commercial royalties for its necessary IP, and licensees could also have charged commercial royalties for any necessary IP rights in the DTCP Specification that they believe they may possess. DTLA rejected such a model in that it clearly would result in higher license costs and greater IP risk to all Adopters and Content Participants.

Adopting the models proposed in the objections filed in this docket would significantly increase licensee costs. If licensees could obtain from DTCP a commercial rate of return on their IP, DTLA would have to do the same. Offering licensees the option of electing a covenant or royalty could not be effectuated at this time, without substantially undermining the terms under which the current Adopters and Content Participants have accepted their respective license obligations. Having an independent expert identify and evaluate the 5C companies’ patents would cost several millions of dollars over the life of the license, which further would have to be passed on in the license rates; and is no panacea with respect to any potential risk of over- or under-inclusion. Moreover, licensees would incur significant expense of evaluating the assertions of other licensees that claimed to have necessary IP. These proposed changes would significantly raise the cost of the license and the risks to the licensees -- but would not grant the licensees any greater rights or benefits than they currently receive under the DTLA agreements.

DTLA further noted that currently more than 90 entities have signed agreements with DTLA, and have found the terms of the DTLA agreements to be reasonable and acceptable. There is no reason to believe that the types of changes proposed by the objectors might prove acceptable to these other entities, and it would be impossible to permit, some five years later, some licensees to charge reasonable royalties while others operated under the covenant. Such changes, even on a voluntary basis, would substantially undermine the fundamental terms upon which these more than 90 entities determined to license DTCP – wreaking substantial prejudice upon these existing adopters with no palpable return in terms of lower costs, lower risks or lower burdens.

Mandatory changes to the Specification are narrow in scope and, per the express terms of the licenses, are limited to non-material changes, corrections and clarifications. Almost all changes to date resulted from mapping DTCP to additional protocols, starting with IEEE 1394 and progressing to USB, MOST, Op-iLink, DTCP-IP and Bluetooth. Such changes enhance choices for manufacturers and consumers, and promote interoperability and interchange of content

among interfaces. Other changes have accommodated the capabilities of new technologies (*e.g.*, PVRs) and are similarly favorable to consumers. Such changes further benefit Adopters and consumers by ensuring that their investments in DTCP-enabled devices will not prematurely be rendered obsolete.

Specification changes do not affect the scope of either DTCP or the covenant. DTCP works the same way on every interface, much like a car stays the same whether traveling a highway or neighborhood street. The scope of the covenant does not extend any IP rights in the interfaces to which DTCP is mapped.

Before any change is made to the Specification, DTLA provides Adopters the right to review and comment on the draft change. Content Participants can comment upon and object to any change that would materially and adversely affect the protections afforded by DTCP or their rights under the agreement. Over the course of the license, DTLA has received comments and questions, but has not received any objections to any of the proposed changes. Mandatory specification changes are not required to be implemented until a minimum of 18 months after becoming final.

DTLA believes that rapid Commission approval of multiple technologies now and into the future can provide an effective springboard for new market entry and further ensure robust competition. Even in the initial round of certifications, several digital output protection technologies have been proposed by well-established CE and IT technology leaders. Nothing impedes additional entrants and technologies from seeking Commission certification in the future. Given the desire for interoperability across home networks, and the convergence of CE and IT cable-ready and satellite receiving products, any and all of these technologies can compete effectively against one another and can coexist.

With respect to the Work Plan regarding localization of content, DTLA noted that Phase One Step 1 of the plan was completed with the identification of an acceptable Round Trip Time number for DTCP-IP. Phase One Step 2 currently is underway, analyzing analogous latency periods and timing considerations for the other interfaces that can use DTCP. Following completion of Phase One, the Work Plan contemplates a Phase Two in which to consider alternatives to RTT and analogous timing periods. According to the Work Plan, if Phase Two is successful, then the mechanisms developed in Phase One may never be implemented. For this reason, DTLA has not published the interim results of Phase One Step 1, inasmuch as it would be imprudent and potentially detrimental for Adopters to begin designing or manufacturing products in reliance upon interim results which may never go into effect. DTLA noted that the obligation to implement any changes resulting from the Work Plan is voluntarily undertaken by those who desire to implement DTCP-IP and all adopters that have signed Adopter Agreements following the final adoption of the DTCP-IP Specification and that, in accordance with the Work Plan, any such changes would have to be commercially reasonable and technologically feasible to implement.

DTLA stated its view that DTCP should be approved on a generic basis rather than on an output by output basis. As noted above, DTCP more than meets the levels of robustness required to "keep honest people honest," and DTCP operates equivalently over every interface to which it has been mapped. Moreover, as a practical matter, permitting a source device to send protected content over any DTCP-protected interface could result in the sending of that content thereafter over any DTCP-protected interface supported by the sink device. DTLA stated that the difference between the scope of authorizations for DTCP outputs in the DFAST agreement and PHILA resulted primarily from the timing of those agreements, noting that the broader generic authorization came later in the PHILA and, thus, reflected the better and more considered view.

The Commission noted that, at present, the DTCP website URL for the Work Plan has been referenced in the DTLA's Certification submission, but has not formally been made of record in this proceeding. By request of the Commission, a copy of the Work Plan is being submitted for the record with this Ex Parte letter.

The Commission also asked, as a technical matter, whether a source and sink device that using DTCP-IP in a wired implementation (such as Ethernet) would be able to authenticate each other through two (2) wireless routers that did not implement DTCP-IP. In response, DTLA notes that if the wired source and sink implementations of DTCP-IP complied with the Specification applicable to DTCP-IP and authenticated accordingly, then content encrypted using AES 128 would be sent from source to sink via such routers. This is considered to provide sufficient security, in light of other attributes such as: Time To Live that inhibit retransmission outside home and personal networks; the inability of unauthorized devices to authenticate with the source and thereby obtain the decryption keys; and, the high probability that a consumer will desire to implement WEP authentication over wireless networks so as to defeat unauthorized access to personal information that the consumer otherwise wishes to protect on her PC.

In accordance with Section 1.1206 of the Commission rules, this original and one copy are being provided to your office, and a copy of this notice is being delivered to those named above.

Very truly yours,

/s/

Seth D. Greenstein

Copies to:

Steven Broeckaert

Rick Chesson

John Gabrysch

Alison Greenwald

William Johnson

Mike Lange

Ms. Marlene H. Dortch
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